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9 Attorneys for BRIAN WAYNE WENDT

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 JONATHAN JOSEPH NELSON, et al.,

17 Defendants.
18

Case No. CR-17-00533-EMC

**BRIAN WENDT'S SUPPLEMENTAL
OPPOSITION TO GOVERNMENT
MOTION FOR LEAVE TO FILE FOR
RECONSIDERATION OF
JANUARY 13, 2021 DISCOVERY
ORDERS [DOC 1448] AND
PROPOSED MOTION FOR PARTIAL
RECONSIDERATION [DOC 1449]**

Date: March 24, 2021

Time: 9:00AM

**Dept: The Honorable Edward M. Chen
District Judge**

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22 The Government has moved to reconsider two case management orders issued on
23 January 13, 2021 complaining that the Court failed to consider Rule 16 and the Jencks
24 Act before ruling. (Docket 1448). Based on this both surprising and unsubstantiated
25 complaint, the Government secured from the Court an opportunity to supplement its
26 highly redacted motion (Docket 1449) so that the defense could have a reasonable
27 opportunity to respond. Unfortunately, and consistent with its approach to discovery
28

**BRIAN WENDT'S SUPPLEMENTAL OPPOSITION TO GOVERNMENT MOTION FOR LEAVE TO FILE FOR
RECONSIDERATION OF JANUARY 13, 2021 DISCOVERY ORDERS [DOC 1448] AND PROPOSED MOTION FOR
PARTIAL RECONSIDERATION [DOC 1449]**

1 issues throughout this case, the Government has not only failed to provide a remotely
 2 colorable basis for moving to reconsider its January 13, 2021, orders but has also failed to
 3 respect the letter and spirit of the Court's February 24, 2021, order which the Court
 4 issued to provide the Government the opportunity to permit the defense to have sufficient
 5 information to respond to the Motion to Reconsider. The Government's approach here,
 6 embodied in the Government's 3 page March 3, 2021, letter to defense counsel amounts
 7 to strategic gesture, and not to a substantive response to the Court's directive, or the
 8 stated defense arguments and concerns—particularly those of counsel for Brian Wendt.
 9 The Government has failed to comply with the purpose and intent of disclosure orders
 10 dating back to June of 2019. The latest failure clearly does little to address and help
 11 remedy the substantial limitations imposed by the pandemic on the defense work during
 12 the home stretch before trial.

13 For these reasons, Brian Wendt submits that this Court should affirm its necessary
 14 and well-considered case management orders that were issued, as this Court knows,
 15 based upon a fully developed record. Mr. Wendt submits that this Court's existing
 16 January 13, 2021, case management orders are necessary to allow his counsel to conduct
 17 necessary litigation and investigation before the October trial date and that, absent these
 18 orders, he will face the choice between going to trial unprepared to address the
 19 centerpieces of the Government's list of witnesses or moving for a continuance of the
 20 trial date despite the fact that he will have been in custody for more than four years
 21 should the trial commence in October.

22 **I. On January 13, 2021, this Court Issued Two Case Management Orders**
 23 **Necessary to Allow the Defense to Prepare for Trial Before October 2021.**

24 On January 13, 2021, this Court issued two case management orders to address the
 25 limitations imposed by the pandemic on defense functions in the few months remaining
 26 before the October trial date.¹ More specifically, this Court ordered the Government to
 27

28 ¹On January 13, 2021, according to the Minutes, the Court "addressed the Government's appeal of Judge Beeler's

1 produce witness statements six months before trial and to immediately produce AEO
 2 materials which had been improperly withheld by the Government despite numerous
 3 direct orders first issued in June 2019 and reaffirmed repeatedly since that date. The
 4 Court heard extensive argument of these issues – which had been fully briefed – and
 5 ruled, in no uncertain terms, that these orders were necessary to move this case toward an
 6 October trial date given the unprecedented challenges to the Sixth Amendment function
 7 during the pandemic:

8 [W]e’re confronted with pandemic situations and extraordinary
 9 situations where you can’t just go by the ordinary rule about, well, we
 10 can disclose six weeks before, eight weeks before and that’s plenty of
 11 time to do your investigation; both given the complexity of this case, as
 12 well as the potential unknown[s] out there about what can be done, how
 13 quickly it can be done, at what point we can resume – can the parties
 14 resume the normal processing of investigation and preparation for trial.
 15 And yet we have to make a decision whether we’re going to try to hold
 16 this trial date.

17 So these present extraordinary circumstances which underscores this
 18 Court’s inherent power in the *W.R. Grace* case to order early discovery.
 19 And early discovery in an unusual circumstance that – for which there
 20 was no precedent, whether it’s *Cerna* or any of those other cases.²

21 **II. The Government Clearly Failed to Provide Any Basis to for Leave to** 22 **Move to Reconsider.**

23 After the January 13, 2021, hearing, the Government moved for reconsideration of
 24 these necessary orders. (Docket 1448 and 1449). The Government so moved on the
 25 extremely thin and easily refutable notion that the Court failed to consider both Rule 16

26 discovery order....” [Doc 1419, at page 4.] The January 13 Order had required continuing disclosure of ‘witness
 27 safety’ material designated as AEO. Also, the Court affirmed the Beeler Order “only with respect to the three
 28 defendants currently scheduled to be tried in Group 1.” (Doc 1419, at page 4.) The Court set forth further
 requirements, including that the Government should provide the defense with information about “...the number of
 Jencks witnesses whose statements are being withheld and the number of pages of Jencks materials so that
 defendants will have some notion of their scope.” (Doc 1419, at page 4.)

² Transcript of proceedings of January 13, 2021, at RT 116:7-21.

1 and the Jencks Act before issuing its Orders.³

2 This notion as well as what arguments the Government mustered collide with the
3 actual record in this case, and with the stated bases for the Court's Order. This Court did
4 not negligently overlook the Jencks Act and Rule 16 in issuing these orders. In fact, the
5 transcript of the January 13, 2021 hearing includes numerous references by Government
6 counsel to the Jencks Act and to Rule 16 across many pages of argument regarding these
7 orders.

8
9 **III. The Government Squandered the Opportunity to Provide the Accused**
10 **with Sufficient Information to Litigate the Motion to Reconsider.**

11 On February 24, 2021, the Court heard argument regarding the Government's
12 Motion for Leave. Without responding to questions about the level of the Government's
13 compliance with Judge Beeler's rulings beginning in 2019 for rolling productions of
14 AEO materials (RT 14-15), the Government explained to the Court that it was seeking
15 reconsideration of the January 13 Order as it applied to 172 pages of materials that had
16 been submitted to the Court (RT 16), supplemented by information contained in one
17 individual's phone (RT 16-17).⁴ The Government's argument was that it was seeking to
18 have the Court exempt from six months prior to the trial disclosure those materials
19 specifically identified in Exhibits 8-12 of the *ex parte* submission to the Court (a
20 combination of Agent reports and actual Jencks Act statements). (RT 19.) For these
21 materials specifically identified, the Government was proposing a production three
22 months before trial. (RT 19.)

23 Counsel for Jon Nelson responded that in order to be able to address the question

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25 ³The Government filed its motion for leave to file a motion for reconsideration (Doc 1448), together with the actual
26 motion (Doc 1449), which was opposed by the Group 1 defendants in a filing on February 5, 2021 (Doc 1474). This
was the frame for the arguments made on February 24, 2021.

27 ⁴This Court should establish whether or not there have been intentional violations by the Government of the AEO
28 case management orders. The record suggests that the Government has withheld reports that existed in 2019 and
should have been disclosed. This Court should voir dire the Government and what has been withheld and why.

1 of whether the defense should respond to the Government’s motion for leave, it would be
 2 useful for the defense to at least have some notion of what type of information was
 3 involved in the 170-plus pages so that the defense could assess a substantive response.

4 During the hearing, the Wendt defense noted its concern that the proposal made by
 5 Mr. Novak on behalf of Jon Nelson, might be viewed as confusing, in view of existing
 6 orders that had been put in place by Judge Beeler and that were supposed to have been
 7 complied with on a rolling basis. As counsel for the Wendt defense pointed out: “And we
 8 are now back to discussing, sort of parsing out alternative mechanisms for the
 9 government to comply with some aspect of Judge Beeler’s orders. It just doesn’t make
 10 sense. We’re not moving this case forward in that respect.” (RT 34:15-18.)⁵

11 Notwithstanding Mr. Wendt’s objections to the motion, the Court carved out
 12 “middle ground” by offering the Government the opportunity disclose limited useful
 13 information “in the vein of a privilege log” (Docket 1513, Minute Order) to allow the
 14 defense to evaluate the merits of the reconsideration motion based on some understanding
 15 of the reports and materials withheld.⁶

16 Unfortunately, the Government squandered the opportunity extended by the Court.
 17 Rather than providing the defense with information that would allow the defense to
 18 oppose the Government’s motion in a meaningful way, the Government provided a letter
 19 on March 3, 2021, attached hereto as Exhibit 1, that conveys virtually no useful
 20 information at all consuming, in the process, another month of valuable and limited time
 21 as we slouch toward the October trial date. The Government’s March 3, 2021 letter
 22 provides generalities at best, and in certain instances, simply a listing of the particular
 23

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 25 ⁵ The Wendt defense also indicated that it was not joining in Mr. Novak’s proposal “about some sort of alternative. Our position is the Court has decided this already on multiple occasions.” (RT 34:20-22.)

26 ⁶ The Court described the information to be provided as “a privilege log-type description,” (RT of February 24, 2021
 27 hearing at 36:21-22) and discussed the nature of proffer at pages 36-38 of that transcript. The Court directed, for
 28 example, that the acts being discussed in the reports be “generically described” without revealing witness identities (RT at 37:3) The Court also directed that “it may not describe the exact act but something that happened as part of their relationship with the enterprise, or whatever, versus something more specific.” RT at 38:14-16.

counts that the witness will “provide testimony” about. Providing the defense in a racketeering conspiracy case “notice” that a witness will provide testimony relating to the racketeering conspiracy – particularly one that covers multiple acts over a number of years and jurisdictions – clearly fails to provide the level of specificity contemplated by the Court and does not allow for a meaningful response by the accused. The Government’s letter simply does not square with the representations made by the Government to the Court on February 24, 2021, that the letter would sufficiently inform defense counsel of the nature of information pertinent to five witnesses.

Given the total lack of a basis for leave to reconsider compounded by the failure to comply with this Court’s specific order to provide the defense with sufficient information to engage the merits, this Court should not reward the Government’s stonewalling and should not waste another day of the limited days remaining before trial.

IV. The Government Has Consistently Violated this Court’s AEO Discovery Orders.

Regrettably, the need for firm case management of this set of discovery issues cannot be summarized in a nutshell. This is because one of the issues before the Court, AEO disclosures, has been litigated numerous times since Judge Beeler first issued her clear and unequivocal order requiring disclosure of law enforcement reports on a rolling basis. (Docket 703).

Beginning in June 2019, this Court issued a series of Orders regarding AEO discovery of law enforcement reports. The Court did so, invoking its case management authority, based on a pattern of delay by the Government with respect to discovery, death penalty notice, and disclosures (some of which alerted the defense to conflict issues which have required significant delays and complications in the defense). The Court, first through the Magistrate Court and subsequently through the District Court, issued clear and specific Orders intended to allow the defense to operate on a reasonably level playing field and understand the parameters of the Government’s case. Though no one knew what

1 was to come in 2020, the Court took these measures before the pandemic froze
2 investigation in the field.

3 The Government has consistently stonewalled these Orders. First, the Government
4 claimed that these Orders merely required a little less redaction. That was litigated and
5 rejected. Then the Government claimed that the Court had not ordered rolling production.
6 That was litigated and rejected (though the Government made this argument again twice
7 during recent hearings in the District Court). After failing to make any rolling
8 productions, in October 2019, the Government requested specific exclusions and the
9 Court granted a set of limited, specific, and minimal exclusions from the productions.

10 Many months later, in late May 2020, the Government let slip during a hearing
11 that it had it AEO materials which it had not produced in 2019 despite this Court's
12 Orders. The Government did not explain the reasoning for withholding these documents
13 except to repeat its incorrect and twice-litigated-and-rejected view that the Court had not
14 ordered rolling productions. When Mr. Wendt objected to this violation of the Orders, the
15 Government asked for an opportunity to brief these issues and, again, the Court heard and
16 rejected the Government's arguments in September 2020.

17 This scenario occurred again on January 13, 2021 and, again, the Court ordered
18 the Government to comply with the June 2019 Order.

19
20 **V. THE GOVERNMENT HAS OVERSTATED THE REACH OF THE**
21 **JENCKS ACT WHICH, IN ANY CASE, IS SUBORDINATE TO**
22 **CASE MANAGEMENT PREROGATIVES UNDER W.R. GRACE**
23 **GIVEN THE EXTRAORDINARY CIRCUMSTANCES OF THE**
24 **PANDEMIC.**

25 The Government's argument to this Court on February 24, 2021, clearly
26 overstated the reach of the Jencks Act. The Government attempted to characterize agent
27 reports of witness interviews as the "Jencks statements of authoring agents...." (RT 19:5-
28 7.) That argument was not correct. The Jencks Act encompasses witness statements and
does not encompass narrative reports and memoranda from law enforcement officers. As

1 demonstrated by the U.S. Supreme Court’s ruling in *Campbell v. United States*, 365 U.S.
 2 85 (1961), in a case in which the Government contended that an FBI Agent’s interview
 3 report of a witness was not a Jencks Act statement under the circumstances of that case,
 4 the United States Supreme Court chided both the Government, and a District Judge, for a
 5 failure of inquiry into the nature and content of an interview report, which the
 6 Government chose in that case to not characterize as a ‘statement.’ “We conclude that
 7 because these errors in the conduct of the inquiry, petitioners are entitled to a
 8 redetermination of their motion for the production of Staula’s pretrial statements...” *Id.* at
 9 99-100.⁷

10 The record of the status conference and hearing of February 24, 2021, does not
 11 indicate, or even suggest, that the Court conducted an independent review such as to be
 12 able to assess the extent to which the Government was accurate in stating that it would
 13 have the right to withhold disclosure of the vast majority of the 172-plus pages of
 14 material discussed during the hearing on the basis that the bulk of that material was truly
 15 Jencks Act covered. Nor did the Court indicate, in response to the Government’s
 16 assertions that the Government had concluded that there was no *Brady* material
 17 intertwined, that the Government had accurately determined that it was not withholding
 18 any non-Jencks *Brady* material. This type of material, as Judge Alsup concluded, is
 19 material “that district courts have the authority, upon a proper record, to exercise their
 20 discretion to require...be disclosed prior to the commencement of trial.” *U.S. v. Cerna*,
 21 633 F.Supp.2d 1053, 1057-58 (N.D.Cal, 2009), *relying in part on United States v. W.R.*
 22 *Grace*, 526 F.3d 499, 513 (9th Cir., 2008).

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 24
 25 ⁷ It should be noted, moreover, that the Jencks-as-to-agents argument is totally inconsistent with the Government’s
 26 stated purpose for the appeal: to protect civilian witness identities. Asserting that law enforcement witness
 27 statements are Jencks should not be disclosed is, at best, a tactic to protect information obtained from civilian
 28 witnesses but not recorded as verbatim or substantially verbatim. Again, what is at stake here is information, not
 witness statements, which the Government possesses and can use to investigate and shape it case but which the
 defense cannot.

V. **THE GOVERNMENT ERRONEOUSLY MAKES REFERENCE TO THE RULE OF *U.S. v. FORT et al.*, WHICH, IN ANY CASE, IS SUBORDINATE TO CASE MANAGEMENT PREROGATIVES UNDER *W.R. GRACE*.**

The question of exactly how much of the information cabined by the Government and presented to the Court *in camera* and *ex parte* is actually sought to be protected under an exercise of discretion within the meaning of F.R.C.P. 16(d) remains a mystery to the defense.

Presumably, on February 24, 2021, the Court had in mind a procedure that would be useful in permitting the defense access to information that would allow defense preparation for the Group 1 trial to proceed while avoiding presenting danger to the safety of five specific witnesses. The March 3, 2021 letter is insufficient. It does not respond to the Court's suggestions of content or to defense counsels' suggestions (made on February 24, 2021) of what might avoid having the Court fully consider the merits of the Government's proposed motion for reconsideration. As the Court made clear in its Discovery Order of January 13, 2021, the discovery-related management of this case has to be viewed in context given the circumstances under which the defense is attempting to prepare itself for trial in the midst of a worldwide pandemic and in the middle of attempts throughout California and other states to abate what has been a more than yearlong nationwide disaster. In that context, citing rulings like *U.S. v. Fort*, 472 F.3d 1106 (9th Cir., 2006), has limited utility. The reality in this case is that much of what the Government seeks to shield here does not fall under the *Fort* rule in that few investigative reports at issue in this particular case were created prior to the involvement of a Federal prosecutor's involvement and prior to a Federal investigation. *Id.*, at 1110-11.

CONCLUSION

This Court entered a Discovery Order in this case designed to facilitate preparation for a trial that would be conducted under extraordinary circumstances (both the

1 preparation and likely the trial as well). The Government's attempt to thread the needle
2 through the production of a barely informative three-page letter should be considered
3 insufficient to foreclose implementation of the Court's February 13, 2021 Discovery
4 Order as it was entered, or Judge Beeler's preexisting orders concerning rolling AEO
5 discovery.

6
7 Dated: March 17, 2021

Respectfully Submitted,
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9
10 /s/ John T. Philipsborn
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PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is Suite 350, 507 Polk Street, San Francisco, California 94102.

On March 17th, 2021, I served the within document entitled:

**WENDT DEFENSE SUPPLEMENT TO OPPOSITION [DOC 1447] TO
MOTION FOR LEAVE TO FILE FOR RECONSIDERATION OF
JANUARY 13, 2021 DISCOVERY ORDER [DOC 1448] AND PROPOSED
MOTION FOR PARTIAL RECONSIDERATION [DOC 1449]**

- () By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
- (X) By electronically transmitting a true copy thereof through the Court's ECF system;
- () By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.

AUSA Kevin Barry
AUSA Ajay Krishnamurthy
AUSA Lina Peng

All defense counsel through ECF

Executed this 17th day of March, 2021, at San Francisco, California.

Signed: /s/ Melissa Stern
Melissa Stern